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4 UNITED STATES DISTRICT COURT
5 EASTERN DISTRICT OF WASHINGTON
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7 JOSEPH PHILLIPS,) No. CV-08-5088-JPH
8 Plaintiff,)
9 v.) ORDER GRANTING DEFENDANT'S
10 SUSAN HUSSEY,) MOTION TO DISMISS AND ISSUE
11 Defendant.) A STRIKE and DENYING AS MOOT
12) PLAINTIFF'S MOTIONS FOR
13) EXTENSION OF TIME AND STAY
14) OF DISCOVERY, AND TO AMEND
15) PLEADINGS OR ADD NAMED
16) PARTIES.
17 (Ct. Rec. 30,39,40)
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15 Plaintiff Joseph Phillips ("Plaintiff") is incarcerated at
16 the Stafford Creek Correction Center ("SCCC") in Aberdeen,
17 Washington and is proceeding *pro se* and in forma pauperis in this
18 civil rights action pursuant to 42 U.S.C. § 1983. (Ct. Rec. 1,6,
19 18). This action was filed on December 10, 2008. The defendant,
20 a Department of Corrections (DOC) nurse, is represented by Senior
21 Assistant Attorney General Jarold P. Cartwright. The parties have
22 consented to proceed before a Magistrate Judge in this case. (Ct.
23 Rec. 20.)

24 Before the Court is defendant's motion to dismiss and issue
25 plaintiff a strike (Ct. Rec. 30) set for hearing September 30,
26 2009 (Ct. Rec. 37) without oral argument. Plaintiff filed two
27

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1 motions, a motion to amend pleadings or add named parties (Ct.
2 Rec. 39), and a motion for extension of time and request for stay
3 of discovery (Ct. Rec. 40) set by Plaintiff for hearing without
4 argument October 30, 2009 (Ct. Rec. 44.) Defendant responded (Ct.
5 Rec. 41, 42).

6 I. Facts alleged in the complaint

7 Plaintiff alleges his civil rights were violated when a DOC
8 nurse, Susan Hussey, R.N., "ripped" out stitches from a
9 laceration, cut him during removal of the sutures from a
10 laceration on his wrist, and refused to treat him, resulting in a
11 "bad infection." Defendant alleges Mr. Phillips failed to exhaust
12 his administrative remedies, available through the DOC grievance
13 procedures, because he failed to allege the same factual basis in
14 his grievance as in his complaint (Ct. Rec. 31 at 2-5, 9, 12-13),
15 and filing a new grievance based on the facts alleged in the
16 complaint is now time barred. (Ct. Rec. 31 at 13.) Defendant
17 additionally asks the Court to issue strike pursuant to 42 U.S.C.
18 § 1915(g). (Ct. Rec. 30 at 13-15.)

19 In his complaint, Mr. Phillips alleges before defendant
20 removed the stitches, he saw her

21 shaking very very badly . . . and so I asked [her]
22 for a medical refusal form and [she] would not give
23 me one . . . [She] starts to take the stitches out
24 of my left forearm first and she is struggling to do
25 that. . . [She] start[ed] to shake more and the [corrections
26 officer] that's standing there tells
[her] that she looks really pretty[.] [Defendant is] shaking
while she is removing my stitches and the
[corrections officer] that was standing there was
telling [defendant] that she is really cute.
. . .

27 [T]he [corrections officer] was telling [defendant]

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1 a whole bunch of inappropriate stuff while she was
2 trying to remove my stitches and the whole time I
3 was asking for a medical refusal form because the
4 [corrections officer] was [distracting defendant]
5 from what she was doing and [defendant] even had
6 a penlight flashlight with her and she was
7 complaining . . . she couldn't see what she was doing
8 . . .

9 [Defendant] cut me with the scissors that she was
10 using and she ripped out half of my stitches[.]
11 [Defendant] did not stop when I asked her to[.] I
12 reported it and tried to get pictures taken of what
13 she did and I was told to suck it up and stop crying[,]
14 it will heal up[.] [T]hey said that I cut on myself
15 so it should[n't] matter[.]

16 . . .
17 a couple days later where [defendant] cut me and
18 ripped out my stitches I got a bad infection and it
19 started to blister up and nobody would do anything
20 about it[.] [M]y wrist would bleed and infection
21 would gush out and nobody would clean it[.] The
22 scissors that [defendant] was using did not have
23 [a] safety guard . . . and she could not see what
24 she was doing[.] I have a mental health condition
25 and I have suicidal thoughts and do self harm[.]
26 I tried to kill myself and I cut myself on the
27 forearm and wrist pretty bad and deep[.] [Defendant]
28 did not give me a medical refusal form like I asked . . .

and she did not do [anything] to stop the [corrections
officer] making inappropriate comments that [took] her
concentration away . . .

[S]he did not put a band-aid on or clean it after
she was done[,], but she did laugh at me and was rude
and didn't acknowledge any of my needs . . .

[A]nytime that I asked her something she told me to
shut up and I don't get nothing [sic] or deserve
nothing.

(Ct. Rec. 1 at 3.)

The medical record shows: (1) defendant removed sutures from
a laceration on plaintiff's left forearm on July 11, 2008. (Ct.
Rec. 32 at 2, 36); and (2) on July 15, 2008, plaintiff asked for
(by way of grievance) wrist and elbow braces because of chronic

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1 pain in those joints. He made no complaint about infection or any
2 problems with the wound where the sutures had been removed on July
3 11, 2008. (Ct. Rec. 32 at 2.)

4 II. Facts alleged in the grievance

5 On August 1, 2008¹, plaintiff filed a Level I Grievance:

6 "I WANT TO GRIEVE: Second shift nurse [defendant]
7 because on a number of occasions the officer that
8 walks her around to pill line always makes
9 inappropriate comments to her and she encourages him
10 to do it and don't [sic] say anything about it or ask
11 him to stop and that is very unprofessional[.] [O]ne
12 time I was [having] my stitches taking [sic] out and
13 she was shaking really bad[.] [H]e said that she was
14 really cute why [sic] [while] she was doing that and
15 she should concentrate and she was ripping the stitches[.]
16 [A]nother time they were coming in the pod to do pill
17 line and the[y] stopped in front of my cell [and] he
18 told her that she should wear more light color clothes
19 like light pink instead of all those dark colors that
20 she wears and then she forgot my nose spray and [when]
21 she went to get it he stated that he like[d] the view
22 from where he was standing[.] [H]e made a comment about
23 her butt [and] this situation [has] been going on for
24 awhile[.] [S]he get[s] so [distracted] by him that I
25 don't even get all my meds[.] [sic] something and then
26 when I let both officer[s] know that I didn't get all
27 my meds she doesn't bring them to me[.] I'm being
28 discriminated against and my rights are being violated
because I should be able to get my meds with no
problems and I shouldn't have to listen to that kind
of talk that be [sic] going on between sussan [sic]
and the officer that walks her around during pill line
and I shouldn't have to deal with that[.] I should be
able to get all my meds with no problems.

SUGGESTED REMEDY: There should be either a
different person walking around with the nurse at
pill line time or there should be a different nurse
passing out meds on second shift and I should get an
apology from Sussan [sic] because of the way she['s]
been treating [me] and she should give me an apology
for being unprofessional and letting that kind of talk

¹Defendant does not argue the grievance was untimely
filed.

1 go on between those two[.] [J]ust because she's a
2 nurse and he's an officer it doesn't [say] [anywhere]
3 in the policy that they can talk like that or conduct
4 themself[ves] like that.

5 (Ct. Rec. 33-2 at 5.)

6 As noted, defendant argues plaintiff failed to exhaust the
7 claim because his grievance does not allege the same facts as the
8 complaint. Specifically, defendant points out the grievance fails
9 to indicate the defendant nurse cut Mr. Phillips or that the wound
10 became infected. (Ct. Rec. 31 at 3.)

11 III. Procedural history

12 Plaintiff's grievance was denied on August 15, 2008:

13 "K. King reports: I have investigated this complaint
14 and interviewed RN Hussey. She states there have not
15 been any inappropriate conversations between her and
16 custody staff. Further nursing supervisor R. Cross
17 has reviewed your Administrative and Health Records
18 and has found that your medications have been
19 provided to you as prescribed."

20 (Ct. Rec. 34 at 5.)

21 Plaintiff did not appeal the denial of this Level I
22 grievance. (Ct. Rec. 34 at 5.) Defendant asserts that by failing
23 to appeal the adverse grievance decision, plaintiff failed to
24 exhaust his administrative remedies as required. (Ct. Rec. 31 at
25 14, relying in part on Ct. Rec. 34 at 5.)

26 The Court notes a nursing supervisor made a serious
27 infraction report against plaintiff on July 16, 2008, based on
28 inappropriate "romantic" correspondence written by Mr. Phillips
to the defendant. (Ct. Rec. 31 at 2, referring to Ct. Rec. 35-2 at
6.) While not directly related to the exhaustion issue and as
discussed more fully below, the Court observes the serious

1 infraction report may be relevant to whether a strike should
 2 issue, particularly since it was issued two weeks before Mr.
 3 Phillips filed his grievance against defendant.

4 IV. Analysis

5 A. *Failure to exhaust administrative remedies*

6 Defendant correctly observes that when, as in this case, an
 7 answer is filed before a motion to dismiss², the motion is
 8 considered a motion for judgment on the pleadings pursuant to Fed.
 9 R. Civ. P. 12(c). (Ct. Rec. 31 at 7, citing *Blenheim v. Dawson &*
 10 *Hall Ltd.*, 35 Wn. App. 435 (1983).

11 Inmates have a fundamental constitutional right of access to
 12 the courts. *Lewis v. Casey*, 518 U.S. 343, 346 (1996). However,
 13 before an inmate may file a § 1983 or other federal lawsuit, he
 14 must first exhaust the available administrative remedies. See 42
 15 U.S.C. § 1997e(a)(1996); *Porter v. Nussle*, 53 U.S. 516, 532
 16 (2002).

17 The record clearly shows Mr. Phillips failed to exhaust his
 18 administrative remedies through the prison grievance procedure.
 19 Plaintiff filed a grievance on August 1, 2008. (Ct. Rec. 34 at 4-
 20 5.) The DOC issued an adverse determination (denial) on August
 21 15, 2008. (Ct. Rec. 34 at 5.) Thereafter, Mr. Phillips failed to
 22 appeal the denial to the next administrative level by filing a
 23 Level 2 grievance. (Ct. Rec. 31 at 6-7, 9-13, 34 at 5.) Mr.
 24 Phillips's failure to exhaust his administrative remedies before
 25

26 ²for failure to state a claim for which relief can be
 27 granted under Fed. R. Civ. P. 12(b)(6)

1 filing suit is fatal to his claim.

2 Nor can the court dismiss without prejudice to give Mr.
3 Phillips time to exhaust his administrative remedies. Mr.
4 Phillips's grievance form and adverse response states: "You may
5 appeal this response by submitting a written appeal to the
6 coordinator within two (2) working days from [the] date this
7 response was received." (Ct. Rec. 33-2 at 5.) Mr. Phillips
8 failed to submit a written appeal within two working days; in
9 fact, he has never appealed the adverse determination. Because
10 plaintiff failed to exhaust his administrative remedies as
11 required before filing his § 1983 claim, the defendant's **motion to**
12 **dismiss the complaint with prejudice (Ct. Rec. 30) is GRANTED.**

13 *B. Issuing a strike pursuant to 42 U.S.C. § 1915(g)*

14 Defendant asks the Court to issue a strike because the
15 complaint is frivolous and plaintiff deceived the Court by
16 misrepresenting that he completed the grievance process. (Ct. Rec.
17 31 at 14.)

18 Plaintiff answered several questions in the complaint as
19 follows:

20 II. B. Have you filed any grievances concerning the facts
21 related to this complaint? YES

22 C. Is the grievance process completed? YES

23 D. Have you sought other informal or formal relief
24 from the proper administrative officials regarding
25 the acts alleged in this complaint? YES.

26 (Ct. Rec. 1 at 2.)

27 Defendant points out plaintiff's deception with respect to

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1 exhaustion prevented the Court from properly screening the
2 complaint before directing service on the defendant, resulting in
3 time wasted by the Court, the DOC and the assistant attorney
4 general -- exactly the waste the Prison Litigation Reform Act was
5 intended to prevent. (Ct. Rec. 31 at 14-15.)

6 If an action is dismissed as frivolous, malicious or because
7 it fails to state a claim, the dismissed case counts as a strike.
8 42 U.S.C. § 1915(g). A complaint is frivolous if it lacks an
9 arguable basis either in law or in fact. See e.g., *Neitzke v.*
10 *Williams*, 490 U.S. 319, 325 (1989); *Andrews v. King*, 398 F.3d
11 1113, 1121 (9th Cir. 2005). Defendant appears to allege the
12 complaint is frivolous (plaintiff's "action should be construed as
13 a strike because it is frivolous) and malicious (a "case is
14 malicious if it was filed with the 'intention or desire to harm
15 another' . . . there is evidence suggesting that Plaintiff has
16 brought this action against Ms. Hussey in retaliation for her
17 complaint about his attempt at romantic advances.")(Ct Rec. 31 at
18 14) (internal quotation omitted).

19 The Court finds the complaint is frivolous because it has no
20 arguable basis in law. Plaintiff filed the complaint averring he
21 completed the grievance process when he had not. Plaintiff is not
22 a stranger to the exhaustion requirement. Plaintiff's § 1983
23 claim in another case was dismissed on February 5, 2007 (about ten
24 months before Mr. Phillips filed the current complaint), for
25 failure to exhaust administrative remedies. (See case CV-06-5070-
26 EFS at Ct. Rec. 10.) Plaintiff's failure to exhaust prior to
27 filing suit, and misrepresenting he did so, constitutes lack of an

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1 arguable basis in law.

2 VI. Conclusion

3 For the reasons discussed above, the Court **GRANTS** Defendants'
4 motion to dismiss the complaint with prejudice. (**Ct. Rec. 30.**) The
5 Court further **ORDERS** that Plaintiff's complaint be dismissed with
6 prejudice and **COUNT AS A STRIKE** pursuant to 42 U.S.C. § 1915(g).

7 **IT IS FURTHER ORDERED** that plaintiff's motion to amend
8 pleadings or add named parties (**Ct. Rec. 39**) and for an extension
9 of time to complete discovery (**Ct. Rec. 40**) **are both denied as**
10 **MOOT. The hearing on the motion to extend time on October 30, 2009**
11 **as STRICKEN AS MOOT.**

12 The District Court Executive is directed to enter this order
13 and to forward copies to Plaintiff and counsel for Defendant.

14 DATED this 30th day of September, 2009.

15
16 S/James P. Hutton

17 JAMES P. HUTTON
18 UNITED STATES MAGISTRATE JUDGE
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